

# Drug Offenses: Sentencing Under the United States Sentencing Guidelines – An Example

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# Drug Offenses: Sentencing Under the United States Sentencing Guidelines – An Example

The federal sentencing guidelines determine the sentences imposed as punishment for most federal crimes. The guidelines system is essentially a scorecard system. This is the application of the sentencing guidelines to the case of a defendant convicted of possession of crack cocaine with the intent to distribute and with unlawful possession of a firearm. The example follows the outline that governs federal sentencing under the guidelines:

- I. The applicable guideline which sets the base offense level for the crime(s) of conviction (i.e., the level assigned based on the nature of the offense):
  - A. Add levels to account for the presence of any aggravating factors indicated in the guideline.
  - B. Subtract levels to account for any mitigating factors designated in the guideline.
- II. Adjustments (levels added and subtracted) for:
  - A. Victim-related
  - B. Role in the offense
  - C. Obstruction
  - D. Multiple counts
  - E. Acceptance of responsibility.
- III. Criminal history category (assign points for criminal record).
- IV. Career offender alternative (required in some cases).
- V. Sentencing table (final offense level points/criminal history points = sentencing range).
- VI. Sentence (sentencing range used to determine punishment)
  - A. Probation
  - B. Imprisonment
  - C. Supervised release
  - D. Restitution
  - E. Fine
  - F. Forfeiture
  - G. Special assessments.
- VII. Departures.

The procedure is equally applicable to sentencing for crimes associated with: heroin, cocaine, crack, PCP, LSD, marihuana (marijuana), amphetamine, methamphetamine, listed (precursor) chemicals, paraphernalia, drug kingpins, as well as the other substances including narcotics and opiates assigned to Schedule I, Schedule II, Schedule III, Schedule IV, and Schedule V of the Controlled Substances Act, and include drug quantity and drug equivalency tables. The report is an excerpt from CRS Report 97-141 A, *Drug Smuggling, Drug Dealing and Drug Abuse: Background and Overview of the Sanctions Under the Federal Controlled Substances Act and Related Statutes*.

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## Introduction

The federal sentencing guidelines determine the sentences meted out as punishment for most federal crimes. The guidelines system is essentially a scorecard system. Congress created the United States Sentencing Commission and authorized it to promulgate sentencing guidelines<sup>1</sup> in order to eliminate and prevent “unwarranted sentencing disparity.”<sup>2</sup> The Commission's mandate includes the power to amend the guidelines or promulgate new ones. Commission amendments become effective unless affirmatively modified or rejected by Act of Congress, 28 U.S.C. 944(p).

The guidelines apply to sentences imposed by the federal courts for crimes committed after November 1, 1987. The statutes that define federal crimes still identify the maximum penalties – and in some cases the minimum sentences – that may be assessed.<sup>3</sup> The guidelines, however, provide the standards that most often

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<sup>1</sup> 28 U.S.C. 991-998; *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the constitutionality of the Commission and the guidelines).

<sup>2</sup> H.R.Rep.No. 1017, 98th Cong., 2d Sess. 34 (1984); S.Rep.No. 225, 98th Cong., 1st Sess. 41 (1983).

<sup>3</sup> Sentencing courts may ignore statutory mandatory minimums upon petition of the government and in some first offender controlled substance cases:

“(e) **Limited authority to impose a sentence below a statutory minimum.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

“(f) **Limitation on applicability of statutory minimums in certain cases.**—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that – (1) the defendant does not have more than 1 criminal history

dictate how federal criminals will be punished within the boundaries Congress has established.

The federal courts must impose a sentence within the range the guidelines call for unless (1) the government moves for departure based upon the defendant's cooperation with law enforcement authorities,<sup>4</sup> (2) the guidelines expressly authorize departure,<sup>5</sup> or (3) the court feels that the Commission failed to adequately consider the kind of factors raised by a particular case when it developed the otherwise applicable guidelines.<sup>6</sup>

The guidelines assign most federal crimes to one of forty-three "offense levels" based on the severity of the offense.<sup>7</sup> Every offender is assigned to one of six "criminal history categories" based upon the extent of his or her past misconduct. The combination of offense levels and criminal history categories governs the severity of the penalties imposed.

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point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement," 18 U.S.C. 3553.

<sup>4</sup> "The [sentencing] court shall impose a sentence of the kind, and within the range, referred to in [the sentencing guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. . . ." 18 U.S.C. 3553(b).

"Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines," U.S.S.G. §5K1.1.

<sup>5</sup> E.g., U.S.S.G. §4A1.3 authorizing a sentence more severe than the guidelines would otherwise permit (a so-called "upward departure") if, in the sentencing court's view, the guideline's procedure for calibrating the weight to be given a defendant's criminal record does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes; a corresponding "downward departure" based upon the court's view that the defendant's past conduct is more commendable than guideline procedure acknowledges is *not* authorized.

<sup>6</sup> 18 U.S.C. 3553(b).

<sup>7</sup> "If the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, . . . the most analogous offense guideline [applies]," U.S.S.G. §2X5.1.

This is an example of the operation of the federal sentencing guidelines applied in a drug case,<sup>8</sup> with the sentence calculated according to the guidelines' score-keeping procedure using the following outline:

- I. The applicable guideline which sets the base offense level for the crime(s) of conviction (i.e., the level assigned based on the nature of the offense).
  - A. Add levels to account for the presence of any aggravating factors indicated in the guideline
  - B. Subtract levels to account for any mitigating factors designated in the guideline.
- II. Adjustments (levels added and subtracted) for:
  - A. Victim related
  - B. Role in the offense
  - C. Obstruction
  - D. Multiple counts
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### ***Application***

“A grand jury indicted Hill for drug-related offenses committed on or about May 18, 1993. Counts one and two charged Hill with possession with intent to distribute approximately 20.8 grams of cocaine base (commonly known as “crack”) and 52.9 grams of cocaine powder respectively, in violation of 21 U.S.C. §841(a)(1).<sup>9</sup> Count

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<sup>8</sup> *United States v. Hill*, 79 F.3d 1477 (6th Cir. 1996).

<sup>9</sup> “(a) . . . it shall be unlawful for any person knowingly or intentionally – (1) to . . . possess with intent to . . . distribute . . . a controlled substance. . . .

“(b) . . . any person who violates subsection (a) of this section shall be sentenced as follows: (1)(A) In the case of a violation of subsection (a) of this section involving . . . (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of . . . (II)

three charged Hill with possession of a firearm in violation of 18 U.S.C. 922(g).<sup>10</sup>

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cocaine. . . (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$4,000,000 . . . or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment . . . a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 . . . or both. If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. . . .

“(B) In the case of a violation of subsection (a) of this section involving . . . (ii) 500 grams or more of a mixture or substance containing a detectable amount of . . . (II) cocaine . . . (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base. . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 . . . or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$4,000,000 . . . or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. . . .

“(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years . . . a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$1,000,000 . . . or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . . a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$2,000,000 . . . or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. . . .” 21 U.S.C. 841(a),(b).

<sup>10</sup> “It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce,” 18 U.S.C. 922(g).

“Whoever knowingly violates subsection . . . (g) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years or both,” 18 U.S.C. 924(a)(2).

Pursuant to a written plea agreement, Hill pleaded guilty to counts one and three, and the government agreed to dismiss count two of the indictment. The government also agreed to dismiss its appeal of the district court’s grant of Hill’s motion to suppress in a 1991 case in which Hill had been indicted for possession with intent to distribute approximately 75.4 grams of cocaine base,” *United States v. Hill*, 79 F.3d 1477, 1480 (6th Cir. 1996). The firearms charge was based on the discovery of a handgun in the master bedroom of an apartment Hill shared with his girlfriend whom he claimed kept the gun for protection. At the time of his arrest, Hill had prior convictions for 6 misdemeanors and a felony for crimes ranging from possession of drug paraphernalia to assault and battery and had been paroled most recently on July 1, 1990.

I. *Base offense level.* The Statutory Index, U.S.S.G. App.A, identifies U.S.S.G. §2D1.1 as the guideline section applicable to violations of 21 U.S.C. 841 and U.S.S.G. §2K2.1 as the guideline section applicable to violations of 18 U.S.C. 922(g). Under section 2D1.1, the base offense level is determined by the section’s Drug Quantity Table unless the offense resulted in the death or serious bodily injury of another (in which case the base offense level is 38 for first time offenders and 43 for those with prior controlled substance convictions), U.S.S.G. §2D1.1(a). The Drug Table (appended) establishes the base offense level according the weight and type of controlled substance involved.

In *Hill*, the 20.8 grams of crack would carry a base offense level of 28, U.S.S.G. §2D1.1(c)(6), but the district court found that the 75.4 grams of crack involved in the 1991 dismissed indictment constituted “relevant conduct”<sup>11</sup> and thus should be counted for sentencing guideline purposes so that the appropriate base offense level for the combined weight of the crack ( $75.4 + 20.8 = 96.2$ ) would be 32, U.S.S.G. §2D1.1(c)(4). The court of appeals found that the two single violations were too remote in time to be considered part of the common pattern necessary to consider the earlier possession “relevant conduct” for sentencing purposes. Thus, the base offense level for possession of between 20 and 35 grams of crack possession offense is:

28

In cases such as *Hill* that involve more than one type of controlled substance, the guidelines provide a conversion device to permit them to be merged into a single offense level. The device involves assigning various controlled substances equivalence weights, using marihuana as a standard, in a Drug Equivalency Table provided in section 2D1.1 (appended *infra* at 27). Thus, for example, 1 gram of heroin has been assigned a drug equivalency of 1 kilogram of marihuana. In the case

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<sup>11</sup> “Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level . . . shall be determined on the basis of the following: (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. . . . (2) sole with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of the conviction. . . .” U.S.S.G. §1B1.3(a).



of crack and powder cocaine, 1 gram of powder cocaine is considered the equivalent of 200 grams of marihuana and 1 gram of crack the equivalent of 20 kilograms (2,000 grams) of marihuana.

In *Hill*, this means 52.9 grams of cocaine yield a marihuana equivalent weight of 10.58 kilograms ( $52.9 \times 200 = 10580$  grams) of marihuana and 20.8 grams of crack yield a marihuana equivalent weight of 416 kilograms ( $20.8 \times 20 = 416$  kilograms) of marihuana. Together they have a marihuana equivalent weight of 426.58 kilograms which translates to a base offense level of: 28

Section 2D1.1 modifies the base offense level for four factors. It *adds* 2 levels if a dangerous weapon is possessed, U.S.S.G. §2D1.1(b)(1); it *adds* 2 levels (to a required minimum total offense level of 26) for drug smuggling involving a private or chartered airplane or involving the defendant as the pilot, captain, navigator or other operator of “any craft or vessel,” U.S.S.G. §2D1.1(b)(2); it *adds* 2 levels for distribution in prison or in a correctional or detention facility, U.S.S.G. §2D1.1(b)(3); and if the offense level is 26 or greater, it *subtracts* 2 offense levels if the defendant is a first time offender, did not use violence or possess a dangerous weapon, was not a prime mover in a continuing criminal enterprise, provided authorities with all the information he had concerning the offense and related offenses, and if no one died or was seriously injured as a result of the offense, U.S.S.G. §§2D1.1(b)(4), 5C1.2.

Because Hill pled guilty to possession of a firearm, over which he might have been found to have constructive possession and which the lower court could have found was possessed in connection with the offense, Hill's offense level for the crack possession offense was increased by +2 (bring the offense level to 30).

With respect to the firearms charge in count three of Hill's indictment, there are eight possible base offense levels for a firearms offense: 26, if the defendant has 2 or more prior felony convictions involving drugs or violence and the firearm is a sawed-off shotgun, sawed-off rifle, machinegun, destructive device (bomb), semiautomatic assault weapon, or has a silencer, U.S.S.G. §2K2.1(a)(1); 24, if the defendant simply has 2 or more prior felony convictions involving drugs or violence, U.S.S.G. §2K2.1(a)(2); 22, if the defendant has a prior felony conviction involving drugs or violence and the firearm is a sawed-off shotgun, sawed-off rifle, machinegun, destructive device (bomb), semiautomatic assault weapon, or has a silencer, U.S.S.G. §2K2.1(a)(3); 20, if the defendant has a prior felony conviction involving drugs or violence or the defendant is a “prohibited person” (person with a previous felony conviction, a fugitive, an illegal alien, drug addict, or mental defective) and the firearm is a sawed-off shotgun, sawed-off rifle, machinegun, destructive device (bomb), semiautomatic assault weapon, or has a silencer, U.S.S.G. §2K2.1(a)(4); 18, if the firearm is a sawed-off shotgun, sawed-off rifle, machinegun, destructive device (bomb), semiautomatic assault weapon, or has a silencer, U.S.S.G. §2K2.1(a)(5); 14 if the defendant is a prohibited person; 6, for the less severely punishable violations of 18 U.S.C. 922 (e.g., dealer violations of the Brady Act waiting requirements), U.S.S.G. §2K2.1(a)(8); and 12, for all other violations, U.S.S.G. §2K2.1(a)(7).

The firearm in *Hill* was a handgun, but Hill had a prior felony conviction involving drugs or violence, so the base offense level under U.S.S.G. §2K2.1 (a)(4) is: 20

Section 2K2.1 requires offense level modification under six circumstances: when several firearms are involved, *add 2 to 10* offense levels based on the number of firearms involved (e.g., 3-7 firearms add 2; 200 or more add 10), U.S.S.G. §2K2.1(b)(1); *reduce to* offense level 6 an offense with a offense level of 12 or 14 if possession is solely for lawful sporting or collection purposes and is not unlawfully used, U.S.S.G. §2K2.1(b)(2); *add 2* offense levels when a destructive device is involved, U.S.S.G. §2K2.1(b)(3); *add 2* offense levels when the firearm is stolen or serial numbers have been tampered with (up to offense level 29), U.S.S.G. §2K2.1(b)(4); *add 4* offense levels and *increase* at least to offense level 18 when the firearm possession occurs in connection with another felony, U.S.S.G. §2K2.1(b)(5); and when the offense involves a record-keeping violation to conceal an underlying offense, use the offense level of the underlying offense, U.S.S.G. §2K2.1(b)(6).

Hill involved possession in connection with another felony resulting in the addition of 4 offense levels: +4 (bringing the offense level to 24)

## II. *Adjustments.*

A. *Victim-Related.* None of the victim-related sentence level adjustments, U.S.S.G. §§3A1.1 to 3A1.4, apply since the case at hand involves neither international terrorism, a hate crime, a vulnerable victim, a government official as a victim, nor a victim under physical restraint: 0 (the offense levels remain at 30 (crack/cocaine) and 24 (firearm possession))

B. *Role in the Offense.* Adjustments may be made to reflect the defendant's level of participation in group criminal activities (increase 2 to 4 levels for group leadership, U.S.S.G. §3B1.1; reduce 2 or 4 levels for minor or minimal participation, U.S.S.G. §3B1.2), for the use of a minor to commit an offense (increase 2 levels, U.S.S.G. §3B1.4), or to account for an offender's abuse of a position of trust or use of a special skill (increase of 2 levels, U.S.S.G. §3B1.3). None are involved in *Hill*: 0 (the offense levels remain 30/24)

C. *Obstruction.* Obstruction of justice makes an increase of 2 levels appropriate, U.S.S.G. §3C1.1, as does reckless endangerment during flight, U.S.S.G. §3C1.2. In *Hill*, the defendant was found to have missed a court appearance and was subsequently arrested under circumstances that suggested he was in hiding. The court accordingly assessed points for obstruction of justice: +2 (the offense levels become 32 (crack/cocaine) and 26 (firearms)).

D. *Multiple Counts.* The multiple count sections of the guidelines merge these two base offense levels into one. The first step in the process is to group similar offenses, U.S.S.G. §3D1.1. Offenses are grouped together which (a) have the same victim and the act or transaction, (b) have the same victim and two or more acts or transactions involving the same scheme or objective, (c) “when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other

adjustment to, the guideline applicable to another of the counts,” or (d) when offense level is calculated on the base of harm, loss or quantity of substance involved, U.S.S.G. §3D1.2.

In *Hill*, the drug and firearms offenses would be grouped together because possession of a firearm is a 2-level adjustment to the base offense level of the drug offense, U.S.S.G. §3D1.2(c). Offenses grouped together carry the offense level of the highest rated offense within the group; in the case of *Hill*, the drug offense (32 (drugs) v. 26 (firearms)), U.S.S.G. §3D1.3(a). A formula in U.S.S.G. §3D1.4 produces the offense level when there is more than one group. (The offense level is 32).

*E. Accept Responsibility.* The court found that Hill, in spite of his guilty plea, had not accepted responsibility for his misconduct, a conclusion supported by the obstruction of justice enhancement, and thus had not earned a 3-level reduction provided in U.S.S.G. §3E1.1: 0 (the offense level remains 32).

*Final Offense Level.* As a result, the final offense in *Hill* is: 32

*III. Criminal History Category.* An offender's criminal record determines his or her criminal history category (within the permissible sentence range for each offense level there are six permissible sentencing ranges arranged according to the seriousness of the defendant's criminal history). Points are assessed for past convictions,<sup>12</sup> for misconduct committed while under judicial supervision such as bail or parole, and for crimes of violence.<sup>13</sup>

Hill's criminal record apparently involved 1 conviction carrying a sentence of more than 1 year and 1 month (3 points), and 6 carrying sentences from between 6 months to 1 year and 1 month (2 points each;  $6 \times 2 = 12$  points), for a total of 15 points.

Since Hill had been paroled in 1990, a 2 point increase for commission of the offense within 2 years of release from imprisonment for a prior offense would have been appropriate had the conduct covered by the dismissed 1991 indictment been “relevant conduct.” Since it was not and since the conduct to which the defendant pled occurred in 1993, no such enhancement was made. Thus Hill's criminal record the criminal history category point total is: 15 points

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<sup>12</sup> 3 points for each past sentence of more than 1 year and 1 month; 2 points for each sentence of imprisonment for 6 months but less than 1 year and 1 month; and 1 point for any other past sentence (up to a total of 4 points), U.S.S.G. §4A1.1(a),(b),(c).

<sup>13</sup> 2 points when the crime for which sentence is being calculated occurred while the defendant was “under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status;” 2 points when the offense under sentence was committed less than 2 years after release from imprisonment for a term of 6 months or more, was committed while in prison, or was committed while the defendant was an escaped prisoner; 1 point for each past conviction for a crime of violence not otherwise related or counted (up to 3 points), U.S.S.G. §4A1.1(d),(e),(f).

IV. *Recidivist Enhancements.* There are past criminal activities which not only determine a defendant's criminal history category point total, but also provide the basis for increasing a defendant's offense level, as in the case of career criminals,<sup>14</sup> armed career criminals,<sup>15</sup> or professional criminals.<sup>16</sup>

The career criminal provisions did not apply in *Hill* because he had only 1 prior felony conviction; the criminal livelihood enhancement (requiring a minimum offense level of 13) was not proven, and would in any event not have enlarged Hill's offense level. With no grounds for recidivist enhancements, Hill remains at an offense level of 32 with 15 criminal history category points.

V. *Sentencing Table.* The guideline's Sentencing Table (next page) indicates that the permissible sentencing range for offense level 32, criminal history category VI (13 or more 12 criminal history points) is not less than 210 nor more than 262 months.

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<sup>14</sup> "A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

| Offense Statutory Maximum | Offense Level* |
|---------------------------|----------------|
| (A) Life                  | 37             |

\* \* \*

(G) More than 1 year, but less than 5 years. . . . . 12

\*If an adjustment from §3E1.1(Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment," U.S.S.G. §4B1.1.

<sup>15</sup> "(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e) is an armed career criminal.

"(b) the offense level for an armed career criminal is the greatest of: (1) the offense level applicable from Chapters Two and Three; (2) the offense level from §41B.1 (Career Offender) if applicable; or (3)(A) 34, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. §5845(a)\*; or (B) 33, otherwise.\* \*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

"(c) The criminal history category for an armed career criminal is the greatest of: (1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or (2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or committed substantive offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. §5845(a); or (3) Category IV," U.S.S.G. §4B1.4.

<sup>16</sup> "If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than 13, unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than 11," U.S.S.G. §4B1.3 (Criminal Livelihood).

SENTENCING TABLE<sup>17</sup>

| Offense<br>Level | Criminal History Category |                        |                          |                         |                           |                     |
|------------------|---------------------------|------------------------|--------------------------|-------------------------|---------------------------|---------------------|
|                  | I<br>(0 or 1<br>pts.)     | II<br>(2 or 3<br>pts.) | III<br>(4, 5, 6<br>pts.) | IV<br>(7, 8, 9<br>pts.) | V<br>(10, 11,<br>12 pts.) | VI<br>(13+<br>pts.) |
| 1                | <i>0-6</i>                | <i>0-6</i>             | <i>0-6</i>               | <i>0-6</i>              | <i>0-6</i>                | <i>0-6</i>          |
| 2                | <i>0-6</i>                | <i>0-6</i>             | <i>0-6</i>               | <i>0-6</i>              | <i>0-6</i>                | [1-7]               |
| 3                | <i>0-6</i>                | <i>0-6</i>             | <i>0-6</i>               | <i>0-6</i>              | [2-8]                     | [3-9]               |
| 4                | <i>0-6</i>                | <i>0-6</i>             | <i>0-6</i>               | [2-8]                   | [4-10]                    | [6-12]              |
| 5                | <i>0-6</i>                | <i>0-6</i>             | [1-7]                    | [4-10]                  | [6-12]                    | <b>9-15</b>         |
| 6                | <i>0-6</i>                | [1-7]                  | [2-8]                    | [6-12]                  | <b>9-15</b>               | 12-18               |
| 7                | <i>0-6</i>                | [2-8]                  | [4-10]                   | <b>8-14</b>             | 12-18                     | 12-21               |
| 8                | <i>0-6</i>                | [4-10]                 | [6-12]                   | <b>10-16</b>            | 15-21                     | 18-24               |
| 9                | [4-10]                    | [6-12]                 | <b>8-14</b>              | 12-18                   | 18-24                     | 21-27               |
| 10               | [6-12]                    | <b>8-14</b>            | <b>10-16</b>             | 15-21                   | 21-27                     | 24-30               |
| 11               | <b>8-14</b>               | <b>10-16</b>           | 12-18                    | 18-24                   | 24-30                     | 27-33               |
| 12               | <b>10-16</b>              | 12-18                  | 15-21                    | 21-27                   | 27-33                     | 30-37               |
| 13               | 12-18                     | 15-21                  | 18-24                    | 24-30                   | 30-37                     | 33-41               |
| 14               | 15-21                     | 18-24                  | 21-27                    | 27-33                   | 33-41                     | 37-46               |
| 15               | 18-24                     | 21-27                  | 24-30                    | 30-37                   | 37-46                     | 41-51               |
| 16               | 21-27                     | 24-30                  | 27-33                    | 33-41                   | 41-51                     | 46-57               |
| 17               | 24-30                     | 27-33                  | 30-37                    | 37-46                   | 46-57                     | 51-63               |
| 18               | 27-33                     | 30-37                  | 33-41                    | 41-51                   | 51-63                     | 57-71               |
| 19               | 30-37                     | 33-41                  | 37-46                    | 46-57                   | 57-71                     | 63-78               |
| 20               | 33-41                     | 37-46                  | 41-51                    | 51-63                   | 63-78                     | 70-87               |
| 21               | 37-46                     | 41-51                  | 46-57                    | 57-71                   | 70-87                     | 77-96               |
| 22               | 41-51                     | 46-57                  | 51-63                    | 63-78                   | 77-96                     | 84-105              |
| 23               | 46-57                     | 51-63                  | 57-71                    | 70-87                   | 84-105                    | 92-115              |
| 24               | 51-63                     | 57-71                  | 63-78                    | 77-96                   | 92-115                    | 100-125             |
| 25               | 57-71                     | 63-78                  | 70-87                    | 84-105                  | 100-125                   | 110-137             |
| 26               | 63-78                     | 70-87                  | 78-97                    | 92-115                  | 110-137                   | 120-150             |
| 27               | 70-87                     | 78-97                  | 87-108                   | 100-125                 | 120-150                   | 130-162             |
| 28               | 78-97                     | 87-108                 | 97-121                   | 110-137                 | 130-162                   | 140-175             |
| 29               | 87-108                    | 97-121                 | 108-135                  | 121-151                 | 140-175                   | 151-188             |
| 30               | 97-121                    | 108-135                | 121-151                  | 135-168                 | 151-188                   | 168-210             |
| 31               | 108-135                   | 121-151                | 135-168                  | 151-188                 | 168-210                   | 188-265             |
| 32               | 121-151                   | 135-168                | 151-188                  | 168-210                 | 188-235                   | 210-262             |
| 33               | 135-168                   | 151-188                | 168-210                  | 188-235                 | 210-262                   | 235-293             |
| 34               | 151-188                   | 168-210                | 188-235                  | 210-262                 | 235-293                   | 262-327             |
| 35               | 168-210                   | 188-235                | 210-262                  | 235-293                 | 262-327                   | 292-365             |
| 36               | 188-235                   | 210-262                | 235-293                  | 262-327                 | 292-365                   | 324-405             |
| 37               | 210-262                   | 235-293                | 262-327                  | 292-365                 | 324-405                   | 360-life            |
| 38               | 235-293                   | 262-327                | 292-365                  | 324-405                 | 360-life                  | 360-life            |
| 39               | 262-327                   | 292-365                | 324-405                  | 360-life                | 360-life                  | 360-life            |
| 40               | 292-365                   | 324-405                | 360-life                 | 360-life                | 360-life                  | 360-life            |
| 41               | 324-405                   | 360-life               | 360-life                 | 360-life                | 360-life                  | 360-life            |
| 42               | 360-life                  | 360-life               | 360-life                 | 360-life                | 360-life                  | 360-life            |
| 43               | life                      | life                   | life                     | life                    | life                      | life                |

Zone A (probation permitted) appears in italics; Zone B (probation permitted only when accompanied by some form of confinement such as night-time confinement, week-end confinement, or home detention) appears in brackets; Zone C (no probation but sentence may be split to include other forms of confinement in addition to imprisonment) appears in bold; Zone D (no probation, a term of imprisonment within the sentencing range is required) appears without highlight.

VI. A. *Probation.* Probation eligibility under the guidelines is very limited. It is limited to those for whom the maximum permissible sentence of imprisonment under the guidelines is no more than 6 months (Zone A on the Sentencing Table (no higher than offense level 8)) or if the court imposes some form of incarceration rather than imprisonment (i.e., weekend or nighttime imprisonment, home confinement, etc.), no more than 1 year (Zone B on the Sentencing Table (no higher than offense level 10)), U.S.S.G. §5B1.1. The probationary period for offense level 6 or higher is not less than 1 nor more than 5 years; below offense level 6, the maximum term of probation is three years, U.S.S.G. §5B1.2. Defendants sentenced at offense level 32, category VI are ineligible for probation.

B. *Substitute Incarceration.* In cases where the offense level carries a maximum term of imprisonment of not more than 16 months (Zone B or C (no higher than offense level 12)), the sentencing court may impose a term of substitute incarceration (intermittent confinement, community confinement, or home detention), U.S.S.G. §5C1.1. Defendants sentenced at offense level 32, category VI are ineligible for substitute incarceration.

C. *Imprisonment.* A sentencing court has discretion to impose any term of imprisonment between 210 and 262 months in cases with an offense level of 32 and a criminal history category of VI. Hill was convicted of violating 18 U.S.C. 922(g) which is punishable by imprisonment for not more than 10 years, 18 U.S.C. 924(a)(2), and of violating 21 U.S.C. 841(a) which is punishable by imprisonment for not less than 5 nor more than 40 years, 21 U.S.C. 841(b)((1)(B)(iii). Any term of imprisonment between 210 and 262 months would come within the statutorily required minimum of 5 years (60 months) and the statutorily permissible maximum of 50 years (600 months) (10 years (§924) + 40 years (§841)).

Because Hill has a prior criminal record (more than 1 criminal history point), he is ineligible for the “safety valve” provisions that waive mandatory minimums for low level, cooperative, first time drug offenders, 18 U.S.C. 3553(f).<sup>18</sup> Because there

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<sup>18</sup> “(f) Limitation on applicability of statutory minimums in certain cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that – (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the



is no indication of Hill's cooperation with authorities, he could not benefit from the general prosecution-triggered waiver of mandatory minimums of 18 U.S.C. 3553(e).<sup>19</sup>

*D. Supervised Release.* After release from imprisonment, defendants are required to serve a term of supervised release of between 1 to 5 years depending on the seriousness of their offense.<sup>20</sup> Violation of 21 U.S.C. 841 is a class B felony and would ordinarily be subject to a term of supervised release of from 3 to 5 years imposed by the court at the time of sentencing. Violations of section 841, however, carry a series of mandatory minimum terms of supervised release ranging from 2 to 10 years depending upon the seriousness of the offense, 21 U.S.C. 841. In a case like Hill's involving more than 5 but less than 50 grams of crack cocaine, the term of supervised release must be not less than 4 years for first time offenders and not less than 8 years for recidivists, 21 U.S.C. 841(b)(1)(B).

*E. Restitution.* Congress has amended the federal restitution provisions in recognition of the difficulties associated with identifying victims and the precise extent of loss in drug cases.<sup>21</sup> The restitution in an amount based upon the amount of public harm caused by the offense, 18 U.S.C. 3663(c)(2)(A), may be ordered to be

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information shall not preclude a determination by the court that the defendant has complied with this requirement," 18 U.S.C. 3553(f).

<sup>19</sup> "Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code," 18 U.S.C. 3553(e).

<sup>20</sup> "The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed. . . ." U.S.S.G. §5D1.1. Unless otherwise provided for a particular offense, class A and B felonies (felonies with a maximum of life or 25 years or more) carry a supervised release term of not less than 3 nor more than 5 years; class C and D felonies (felonies with a maximum of 5 years or more) of not less than 2 nor more than 3; and class E felonies and A misdemeanors a term of 1 year (crimes with a maximum of more than 6 months), U.S.S.G. 5D1.2.

Failure to comply with the conditions of supervised release can result in the further imprisonment for a term of not more than 5 years for a class A felony, 3 years for a class B felony, 2 years for a class C or D felony, and 1 year for any other offense, 18 U.S.C. 3583(e)(3). Possession of a controlled substance while on supervised release is an automatic ground for revocation, 18 U.S.C. 3583(g).

<sup>21</sup> "(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii) [relating to the defendant's ability to pay and the discretion of the court to forego restitution if the process would result unduly complication of prolongation], when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861 or 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection," 18 U.S.C. 3663(c)(1), added by §205(a)(3) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1230 (1996).

paid to state entities, 18 U.S.C. 3663(c)(3); may not exceed the maximum permissible fine, 18 U.S.C. 3663(c)(2)(B); stands in priority behind any forfeitures, fines or penalty assessments, 18 U.S.C. 3663(c)(4),(5). The court in its discretion may forego imposing a fine in order to enable a defendant to make restitution; conversely unless required by statute, the court may forego a discretionary restitution order if “the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process,” U.S.S.G. §5E1.1(b).

F. *Fine*. The guidelines establish a fine schedule according to offense level.<sup>22</sup> The sentencing guidelines call for a fine of between \$17,500 and \$175,000 for crimes at an offense level of 32, U.S.S.G. 5E1.2(c)(3). The court need not impose a fine where the defendant is unable and unlikely to become able to pay any fine imposed, U.S.S.G. 5E1.2(a). If the court does not impose or waives the fine imposed, it may impose alternative sanctions.<sup>23</sup>

G. *Special assessment*. Federal courts must impose a special assessment at sentencing for each violation of federal law in an amount determined by the seriousness of the offense, 18 U.S.C. 3013; U.S.S.G. §5E1.3. The special assessment for the two felony counts in *Hill* would have been \$100 (2 x \$50).<sup>24</sup>

H. *Forfeiture*. Criminal forfeitures which become operable upon conviction for certain offenses are announced as part of the sentencing process, 18 U.S.C. 3554; U.S.S.G. §5E1.4. The prospect of criminal forfeiture is not mentioned in *Hill*, but as

<sup>22</sup>

Fine Table

| Offense<br>Level |       | Minimum  | Maximum   |
|------------------|-------|----------|-----------|
| 3 and below      | ..... | \$100    | \$5000    |
|                  | * * * |          |           |
| 10-11            | ..... | \$2000   | \$20,000  |
|                  | * * * |          |           |
| 18-19            | ..... | \$6,000  | \$60,000  |
|                  | * * * |          |           |
| 32-34            | ..... | \$17,500 | \$175,000 |
|                  | * * * |          |           |
| 39 and above     | ..... | \$25,000 | \$250,000 |

U.S.S.C. §5E1.2(c)(3).

<sup>23</sup> “If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances,” U.S.S.G. §5E1.2(e).

<sup>24</sup> The assessment would have been \$200 if the offense in *Hill* had been committed on or after April 24, 1996, the date of enactment of the Antiterrorism and Effective Death Penalty Act which increased the special assessments from \$50 to \$100, 18 U.S.C. 3013(a)(2), as amended by §210, Pub.L.No. 104-132, 110 Stat. 1240 (1996).



will be discussed in a moment any property derived from or used in a violation of the controlled substances provisions, including 21 U.S.C. 841, is subject to criminal forfeiture under 21 U.S.C. 853.

I. *Cost of Prosecution.* Several statutes authorize the court to assess the costs of prosecution against defendants convicted of violating their commands, U.S.S.G. §5E1.5. The statutes under which Hill was convicted are not among them, although the court may include the costs of imprisonment, probation or supervised release as an addition to any fine that it imposes, U.S.S.G. §5E1.2(i).

J. *Cost of Notification of Victims.* Section 3555 of title 18 authorizes sentencing courts to order a defendant to pay for the cost of victim notification up to a maximum of \$20,000; the guidelines permit the court to offset the cost against any fine imposed, U.S.S.G. §5F1.4. This provision seems inapplicable in *Hill*.

VII. *Departures.* The circumstances under which a court may impose a sentence outside of the ranges called for by the guidelines are limited. A court may depart from the sentence called for by the guidelines (1) upon the request of the government in recognition of the defendant's cooperation with authorities, 28 U.S.C. 994(n), U.S.S.G. §5K1.1; (2) where the criminal history provisions do not adequately reflect the seriousness of the defendant's past criminal record, U.S.S.G. §4A1.3; or (3) where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," 18 U.S.C. 3553(b); U.S.S.G. §5K2.0.

The guidelines note that the "[c]ircumstances that may warrant departure from the guidelines [based on want of guideline consideration] cannot, by their very nature, be comprehensively listed and analyzed in advance," U.S.S.G. §5K2.0. The guidelines, however, do contain 20 policy statements concerning factors that might be thought to fit this category, U.S.S.G. §§5K2.1 to 5K2.21. Moreover, the annual amendment cycle permits the Sentencing Commission to adjust the guidelines to account for previously unconsidered circumstances when they arise. The Commission notes that departure should be reserved for those rare cases marked by circumstances carrying them from the "heartland" of situations addressed by the applicable sentencing guideline.<sup>25</sup>

## **Other Consequences of Controlled Substance Violations**

### ***Forfeitures***

Forfeiture is the loss of any right – ordinarily a property right – as a consequence of a breach of some legal obligation.<sup>26</sup> Congress and state legislatures have

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<sup>25</sup> "An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant . . . if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing," U.S.S.G. §5K2.0.

<sup>26</sup> BLACK'S LAW DICTIONARY, 661 (7th ed. 1999).

authorized the use of forfeiture for over two hundred years. Recourse to both civil and criminal forfeiture provisions is a common feature of federal anti-drug abuse efforts. Illicit controlled substances, the proceeds from drug trafficking, any property that can be traced to such proceeds, and any property used to facilitate drug trafficking can be confiscated.<sup>27</sup>

Forfeiture follows one of two procedural routes. Although crime triggers all forfeitures, they are classified as civil forfeitures or criminal forfeitures according to the nature of procedure which ends in confiscation.

### **Civil Forfeiture**

Civil forfeiture is ordinarily the product of civil, in rem, proceedings in which the property is treated as the offender.<sup>28</sup> Within the confines of due process and the language of the applicable statutes, the guilt or innocence of the property owner is irrelevant; it is enough that the property was involved in a violation to which forfeiture attaches.<sup>29</sup> Criminal forfeiture proceedings, on the other hand, are in personam proceedings, and confiscation is only possible upon the conviction of the owner of the property and only to the extent of his interest.<sup>30</sup>

Civil forfeiture begins with actual or constructive seizure of the property by the government.<sup>31</sup> In most instances, federal agencies can complete confiscation

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<sup>27</sup> See e.g., 21 U.S.C. 881, 853; 18 U.S.C. 981 to 985, 1963.

<sup>28</sup> “This [civil] ‘forfeiture proceeding . . . is in rem. It is the property which is proceeded against, and by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient,’” *United States v. Ursery*, 518 U.S. 267, 275 (1996), quoting *Various Items of Personal Property v. United States*, 282 U.S. 577, 284 (1931).

<sup>29</sup> *Bennis v. Michigan*, 516 U.S. 442, 453 (1996). Innocent owners have the benefit of a statutory defense in civil forfeiture cases conducted under the controlled substance and money laundering statutes, but not those conducted under the customs laws, 18 U.S.C. 983(d),(i).

<sup>30</sup> E.g., 21 U.S.C. 853(a); 18 U.S.C. 982, 1963(a).

<sup>31</sup> *United States v. Ursery* 518 U.S. at 289 (“In contrast to the in personam nature of criminal actions, [forfeiture] actions in rem have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object”)(quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974); *Dobbin's Distillery v. United States*, 96 U.S. 395, 396 (1877).

In fact, until the Supreme Court's decision in *Republic National Bank v. United States*, 506 U.S. 80 (1992), confirmed that initial rather continued control was ordinarily sufficient to support jurisdiction, some believed that a court's continued jurisdiction depended upon its continued control over the res, and that its power to proceed disappeared if the property were released other than by accident, fraud or some other improper or inequitable means, *United States v. \$1,322,242.58*, 938 F.2d 433, 437 (3d Cir. 1991); *United States v. \$84,740.00 U.S. Currency*, 900 F.2d 1402, 1404 (9th Cir. 1990); *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1435-436 (11th Cir. 1991); *Appellate Jurisdiction for Civil Forfeiture: The Case for the Continuation of Jurisdiction Beyond the Release of*

administratively, if the property owner does not challenge the forfeiture.<sup>32</sup> Those who wish to contest must demonstrate that they have a legal interest in the property.<sup>33</sup>

When administrative forfeiture is unavailable, when a claimant has successfully sought judicial proceedings, or when the government has elected not to proceed administratively, the government may seek to secure a declaration of forfeiture by filing either a complaint or a libel against the property.<sup>34</sup> In controlled substance, money laundering and most civil forfeitures, the government bears the burden of establishing its right to confiscation by a preponderance of the evidence.<sup>35</sup>

Where the property is declared forfeited, its disposal is a matter of statute, but the proceeds from most federal forfeitures go into one of two special funds for the Department of Justice and the Department of the Treasury where they are available for federal and state law enforcement purposes.<sup>36</sup>

Should the court determine that the property is not subject to forfeiture, it must be returned to its owner.<sup>37</sup> Prevailing claimants may be entitled to compensation for damages to the property incurred while in federal custody,<sup>38</sup> attorneys' fees, post-judgment interest, and in some instances pre-judgment interest.<sup>39</sup>

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*the Res*, 65 FORDHAM LAW REVIEW 679 (1991).

Because realty cannot be seized until after the property owner has been given an opportunity for hearing, the procedure differs slightly in the case of real property, e.g., 18 U.S.C. 985.

<sup>32</sup> Under federal customs law, administrative forfeiture may be used if the property to be forfeited is cash; or if the property is worth less than \$500,000; or is a boat, plane or car used to carry or store drugs, 19 U.S.C. 1607. Many federal forfeiture statutes adopt customs procedures either directly or by cross reference, e.g., 21 U.S.C. 881(d).

<sup>33</sup> 18 U.S.C. 983(a); 19 U.S.C. 1608.

<sup>34</sup> *Id.*

<sup>35</sup> 18 U.S.C. 983(c); *United States v. Real Property in Section 9 (Gahagan)*, 241 F.3d 796, 798 (6<sup>th</sup> Cir. 2001); *United States v. Wagoner County Real Estate*, 278 F.3d 1091, 1097 n.5 (10<sup>th</sup> Cir. 2002). Forfeitures under the Tariff Act of 1930, the Internal Revenue Code, and a few others are not governed by the procedures generally applicable to federal civil forfeitures, 18 U.S.C. 983(i).

<sup>36</sup> The Department of Justice Asset Forfeiture Fund, 28 U.S.C. 524(c), and the Department of the Treasury Forfeiture Fund, 31 U.S.C. 9703.

<sup>37</sup> 28 U.S.C. 2465; *Republic National Bank v. United States*, 506 U.S. 80, 95 (1992); *United States v. Seifuddin*, 820 F.2d 1074, 1078-79 (9<sup>th</sup> Cir. 1987). The property owner, however, is not entitled to the return of property cannot be lawfully possessed, *Boggs v. Rubin*, 161 F.3d 37, 40 (D.C.Cir. 1998); *United States v. Felici*, 208 F.3d 667, 670 (8<sup>th</sup> Cir. 2000).

<sup>38</sup> 28 U.S.C. 2680(c).

<sup>39</sup> 28 U.S.C. 2465. The courts will award pre-judgment interest in forfeiture cases brought under the controlled substance and money laundering statutes where the government sought unsuccessfully to confiscate cash, negotiable instruments, or the proceeds from the sale (prior to the completion of forfeiture proceedings) of other contested property, 28 U.S.C. 2465(b)(1)(C).

## **Criminal Procedure**

Although less numerous than civil confiscation statutes, criminal forfeiture statutes are widely used. Criminal forfeiture is a consequence of conviction.<sup>40</sup> It is punishment, even though it may also serve remedial purposes very effectively.<sup>41</sup> The indictment upon which the conviction is based must list the property which the government asserts is subject to confiscation.<sup>42</sup> Since the court's jurisdiction does not depend upon initial control of the res, it need not be seized before forfeiture is declared. The court, however, in some instances may restrain the use or transfer of property the government contends is subject to confiscation.<sup>43</sup> The defenses to criminal forfeiture differ somewhat from those available in cases of civil forfeiture. For example, since conviction is a prerequisite to confiscation, acquittal will bar forfeiture.

After conviction of the defendant, the court usually declares forfeited property described in the indictment and found subject to confiscation by the jury or the trier of fact.<sup>44</sup> Those with claims to the property, other than the defendant, are then entitled to notice and a judicial hearing on their claims.<sup>45</sup> The disposal of property which remains after claims have been resolved is a matter of statute, but like most civil forfeitures the proceeds from most criminal forfeitures go to either the Department of Justice or the Department of the Treasury forfeiture funds.<sup>46</sup>

## **Civil Penalties**

Violations of the regulatory restrictions by registrants under the Controlled Substances Act are punishable by a civil penalty of up to \$25,000, 21 U.S.C. 842(c).<sup>47</sup> And possession of small amounts of controlled substances are punishable by a civil penalty of not more than \$10,000, 21 U.S.C. 844a. The Foreign Narcotics Kingpin Designation Act calls for civil penalties of up to \$1 million for engaging in prohibited

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<sup>40</sup> E.g., 18 U.S.C. 1963 ("Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States"); 21 U.S.C. 853; *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660, 665 (4th Cir. 1996).

<sup>41</sup> The federal Racketeer Influenced and Corrupt Organization (RICO) forfeiture statute, for example, is designed not only to sever the offender from the organization he or she has corrupted but to confiscate any property right which affords a source of influence over the enterprise, 18 U.S.C. 1963(a)(2)(D).

<sup>42</sup> Fed.R.Crim.P. 7(c).

<sup>43</sup> E.g., 21 U.S.C. 853(e)(1),(2). Substitute assets may become subject to forfeiture if the tainted property has become unavailable, 21 U.S.C. 853(p), but most courts have been reluctant to issue pre-trial restraint orders on substitute assets, *United States v. Gotti*, 155 F.3d 144, 147 (2d Cir. 1998); *United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996).

<sup>44</sup> E.g., 18 U.S.C. 1963(e); 21 U.S.C. 853(g).

<sup>45</sup> E.g., 18 U.S.C. 1963(l); 21 U.S.C. 853(n).

<sup>46</sup> 28 U.S.C. 524(c)(4); 31 U.S.C. 9703(d).

<sup>47</sup> As noted earlier knowing violations are also punishable by criminal penalties.

financial transactions with presidentially designated foreign drug kingpins, 21 U.S.C. 1906.

## ***Other Disabilities***<sup>48</sup>

### ***Federal Benefits***

Both state and federal courts may impose a sentence rendering defendant convicted of controlled substance possession or trafficking offenses ineligible for various federal benefits, 21 U.S.C. 862. The disqualification may run for up to a year for a first time possession offender and up to five years for a first time trafficker or for a possession offender with a prior possession conviction, *id.* Dealers with a single prior conviction may become ineligible for up to 10 years and those convicted more frequently may be declared permanently ineligible, *id.* Unless, the state has opted out, those with state or federal drug-related, felony convictions are ineligible for assistance under the food stamp program or the federally funded programs for aid to needy families with children, 21 U.S.C. 862a.

### ***Injunctions***

Anyone with a federal felony conviction for dealing in precursor chemicals ("listed chemicals") may also be enjoined from engaging in transactions involving such chemicals for up to ten years, 21 U.S.C. 841(f); 21 U.S.C. 843(e).

### ***Mandatory Probation Revocation***

Federal probation must include a condition that the probationer refrain from unlawful possession of controlled substances, 18 U.S.C. 3563(a)(3), and violation of the condition requires revocation of probation, 18 U.S.C. 3565(b)(1).

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<sup>48</sup> This is a sampling of the disabilities under federal law that flow from conviction for a violation of the federal controlled substances provisions; disabilities triggered by wider range of offenses, e.g., any felony violation, and disabilities under state law, even if federally encouraged, are beyond the scope of our discussion.

## APPENDIX

### 2D1.1(c) Drug Quantity Table

| Controlled Substances and Quantity   | Base Offense Level |
|--|--------------------|
| (1) 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates);<br>150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);<br>1.5 KG or more of Cocaine Base;<br>30 KG or more of PCP, or 3 KG or more of PCP(actual);<br>15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of Ice;<br>15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual)<br>300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);<br>12 KG or more of Fentanyl;<br>3 KG or more of Fentanyl Analogue;<br>30,000 KG or more of Marihuana;<br>6,000 KG or more of Hashish;<br>600 KG or more of Hashish Oil;<br>30,000,000 units or more of Schedule I or II Depressants;<br>1,875,000 units or more of Flunitrazepam.  | Level 38           |
| (2) At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);<br>At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);<br>At least 500 G but less than 1.5 KG of Cocaine Base;<br>At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);<br>At least 5 KG but less than 15 KG of Methamphetamine, or<br>At least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of Ice;<br>At least 5 KG but less than 15 KG of Amphetamine,<br>At least 500 G but less than 1.5 KG of Amphetamine (actual);<br>At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);<br>At least 4 KG but less than 12 KG of Fentanyl;<br>At least 1 KG but less than 3 KG of a Fentanyl Analogue;<br>At least 10,000 KG but less than 30,000 KG of Marihuana;<br>At least 2,000 KG but less than 6,000 KG of Hashish;<br>At least 200 KG but less than 600 KG of Hashish Oil;<br>At least 10,000,000 but less than 30,000,000 units or more of Schedule I or II Depressants;<br>At least 625,000 but less than 1,875,000 units or more of Flunitrazepam. | Level 36           |
| (3) At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);<br>At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);<br>At least 150 G but less than 500 G of Cocaine Base;<br>At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);<br>At least 1.5 KG but less than 5 KG of Methamphetamine, or<br>At least 150 G but less than 500 G of Methamphetamine (actual),  | Level 34           |

or at least 150 G but less than 500 G of Ice;  
At least 1.5 KG but less than 5KG of Amphetamine, or  
At least 150 G but less than 500 G of Amphetamine (actual);  
At least 30 G but less than 100 G of LSD  
(or the equivalent amount of other Schedule I or II  
Hallucinogens);  
At least 1.2 KG but less than 4 KG of Fentanyl;  
At least 300 G but less than 1 KG of a Fentanyl Analogue;  
At least 3,000 KG but less than 10,000 KG of Marihuana;  
At least 600 KG but less than 2,000 KG of Hashish;  
At least 60 KG but less than 200 KG of Hashish Oil;  
At least 3,000,000 but less than 10,000,000 units or more of  
Schedule I or II Depressants;  
At least 187,500 but less than 625,000 units or more  
of Flunitrazepam.

- (4) At least 1 KG but less than 3 KG of Heroin Level 32  
(or the equivalent amount of other Schedule I or II Opiates);  
At least 5 KG but less than 15 KG of Cocaine  
(or the equivalent amount of other Schedule I or II  
Stimulants);  
At least 50 G but less than 150 G Cocaine Base;  
At least 1 KG but less than 3 KG of PCP, or at least 100 G but  
less than 300 G of PCP (actual);  
At least 500 G but less than 1.5 KG of Methamphetamine, or  
At least 50 G but less than 150 G of Methamphetamine  
(actual), or at least 50 but less than 150 G of Ice;  
At least 500 G but less than 1.5 KG of Amphetamine, or  
At least 50 G but less than 150 G of Amphetamine (actual);  
At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II  
Hallucinogens);  
At least 400 G but less than 1.2 KG of Fentanyl;  
At least 100 G but less than 300 G of a Fentanyl Analogue;  
At least 1,000 KG but less than 3,000 KG of Marihuana;  
At least 200 KG but less than 600 KG of Hashish;  
At least 20 KG but less than 60 KG of Hashish Oil;  
At least 1,000,000 but less than 3,000,000 units or more of  
Schedule I or II Depressants;  
At least 62,500 but less than 187,500 units or more  
of Flunitrazepam.

- (5) At least 700 G but less than 1 KG of Heroin Level 30  
(or the equivalent amount of other Schedule I or II Opiates);  
At least 3.5 KG but less than 5 KG of Cocaine  
(or the equivalent amount of other Schedule I or II  
Stimulants);  
At least 35 G but less than 50 G of Cocaine Base;  
At least 700 G but less than 1 KG of PCP, or at least 70 G  
but less than 100 G of PCP (actual);  
At least 350 G but less than 500 G of Methamphetamine, or  
At least 35 G but less than 50 G of Methamphetamine (actual),  
or at least 35 G but less than 50 G of Ice;  
At least 350 G but less than 500 G of Amphetamine, or  
At 35 G but less than 50 G of Amphetamine (actual);  
At least 7 G but less than 10 G of LSD  
(or the equivalent amount of other Schedule I or II  
Hallucinogens);  
At least 280 G but less than 400 G of Fentanyl;  
At least 70 G but less than 100 G of a Fentanyl Analogue;  
At least 700 KG but less than 1,000 KG of Marihuana;  
At least 140 KG but less than 200 KG of Hashish;  
At least 14 KG but less than 20 KG of Hashish Oil;  
At least 700,000 but less than 1,000,000 units or more of  
Schedule I or II Depressants;



At least 43,750 but less than 62,500 units or more  
of Flunitrazepam.

- |   |          |
|---|----------|
| (6) At least 400 G but less than 700 G of Heroin<br>(or the equivalent amount of other Schedule I or II Opiates);<br>At least 2 KG but less than 3.5 KG of Cocaine<br>(or the equivalent amount of other Schedule I or II<br>Stimulants);<br>At least 20 G but less than 35 G of Cocaine Base;<br>At least 400 G but less than 700 G of PCP, or at least 40 G<br>but less than 70 G of PCP (actual);<br>At least 200 G but less than 350 G of Methamphetamine, or<br>At least 20 G but less than 35 G of Methamphetamine (actual),<br>or at least 20 G but less than 35 G of Ice;<br>At least 200 G but less than 350 G of Amphetamine, or<br>At least 20 G but less than 35 G of Amphetamine (actual);<br>At least 4 G but less than 7 G of LSD<br>(or the equivalent amount of other Schedule I or II<br>Hallucinogens);<br>At least 160 G but less than 280 G of Fentanyl;<br>At least 40 G but less than 70 G of a Fentanyl Analogue;<br>At least 400 KG but less than 700 KG of Marihuana;<br>At least 80 KG but less than 140 KG of Hashish;<br>At least 8 KG but less than 14 KG of Hashish Oil<br>At least 400,000 but less than 700,000 units or more of<br>Schedule I or II Depressants;<br>At least 25,000 but less than 43,750 units or more<br>of Flunitrazepam. | Level 28 |
| (7) At least 100 G but less than 400 G of Heroin<br>(or the equivalent amount of other Schedule I or II Opiates);<br>At least 500 G but less than 2 KG of Cocaine<br>(or the equivalent amount of other Schedule I or II<br>Stimulants);<br>At least 5 but less than 20 G of Cocaine base;<br>At least 100 G but less than 400 G of PCP, or at least 10 G<br>but less than 40 G of PCP (actual);<br>At least 50 G but less than 200 G of Methamphetamine, or<br>At least 5 G but less than 20 G of Methamphetamine (actual),<br>or at least 5 G but less than 20 G of Ice;<br>At least 50 G but less than 200 G of Amphetamine, or<br>At least 5 G but less than 20 G of Amphetamine (actual);<br>At least 1 G but less than 4 G of LSD<br>(or the equivalent amount of other Schedule I or II<br>Hallucinogens);<br>At least 40 G but less than 160 G of Fentanyl;<br>At least 10 G but less than 40 G of a Fentanyl Analogue;<br>At least 100 KG but less than 400 KG of Marihuana;<br>At least 20 KG but less than 80 KG of Hashish;<br>At least 2 KG but less than 8 KG of Hashish Oil;<br>At least 100,000 but less than 400,000 units or more of<br>Schedule I or II Depressants;<br>At least 6,250 but less than 25,000 units or more<br>of Flunitrazepam.             | Level 26 |
| (8) At least 80 G but less than 100 G of Heroin<br>(or the equivalent amount of other Schedule I or II Opiates);<br>At least 400 G but less than 500 G of Cocaine<br>(or the equivalent amount of other Schedule I or II<br>Stimulants);<br>At least 4 G but less than 5 G of Cocaine Base;<br>At least 80 G but less than 100 G of PCP, or at least 8 G but<br>less than 10 G of PCP (actual);<br>At least 40 G but less than 50 G of Methamphetamine, or  | Level 24 |



- At least 4 G but less than 5 G of Methamphetamine (actual),  
or at least 4 G but less than 5 G of Ice;  
At least 40 G but less than 50 G of Amphetamine, or  
At least 4 G but less than 5 G of Amphetamine (actual);  
At least 800 MG but less than 1 G of LSD  
(or the equivalent amount of other Schedule I or II  
Hallucinogens);  
At least 32 G but less than 40 G of Fentanyl;  
At least 8 G but less than 10 G of a Fentanyl Analogue;  
At least 80 KG but less than 100 KG of Marihuana;  
At least 16 KG but less than 20 KG of Hashish;  
At least 1.6 KG but less than 2 KG of Hashish Oil;  
At least 80,000 but less than 100,000 units or more of  
Schedule I or II Depressants;  
At least 5,000 but less than 6,250 units or more  
of Flunitrazepam.
- (9) At least 60 G but less than 80 G of Heroin Level 22  
(or the equivalent amount of other Schedule I or II Opiates);  
At least 300 G but less than 400 G of Cocaine  
(or the equivalent amount of other Schedule I or II  
Stimulants);  
At least 3 G but less than 4 G of Cocaine Base;  
At least 60 G but less than 80 G of PCP, or at least 6 G but  
less than 8 G of PCP (actual);  
At least 30 G but less than 40 G of Methamphetamine, or  
At least 3 G but less than 4 G of Methamphetamine (actual), or  
at least 3 G but less than 4 G of Ice;  
At least 30 G but less than 40 G of Amphetamine, or  
At least 3 G but less than 4 G of Amphetamine (actual);  
At least 600 MG but less than 800 MG of LSD  
(or the equivalent amount of other Schedule I or II  
Hallucinogens);  
At least 24 G but less than 32 G of Fentanyl;  
At least 6 G but less than 8 G of a Fentanyl Analogue;  
At least 60 KG but less than 80 KG of Marihuana;  
At least 12 KG but less than 16 KG of Hashish;  
At least 1.2 KG but less than 1.6 KG of Hashish Oil;  
At least 60,000 but less than 80,000 units or more of  
Schedule I or II Depressants;  
At least 3,750 but less than 5,000 units or more  
of Flunitrazepam.
- (10) At least 40 G but less than 60 G of Heroin Level 20  
(or the equivalent amount of other Schedule I or II Opiates);  
At least 200 G but less than 300 G of Cocaine  
(or the equivalent amount of other Schedule I or II  
Stimulants);  
At least 2 G but less than 3 G of Cocaine Base;  
At least 40 G but less than 60 G of PCP, or at least 4 G but  
less than 6 G of PCP (actual);  
At least 20 G but less than 30 G of Methamphetamine, or  
At least 2 G but less than 3 G of Methamphetamine (actual), or  
at least 2 G but less than 3 G of Ice;  
At least 20 G but less than 30 G of Amphetamine, or  
At least 2 G but less than 3 G of Amphetamine (actual);  
At least 400 MG but less than 600 MG of LSD (or the equivalent  
amount of other Schedule I or II Hallucinogens);  
At least 16 G but less than 24 G of Fentanyl;  
At least 4 G but less than 6 G of a Fentanyl Analogue;  
At least 40 KG but less than 60 KG of Marihuana;  
At least 8 KG but less than 12 KG of Hashish;  
At least 800 G but less than 1.2 KG of Hashish Oil;  
At least 40,000 but less than 60,000 units of

- Schedule I or II Depressants or  
Schedule III substances;  
At least 2,500 but less than 3,750 units of Flunitrazepam .
- (11) At least 20 G but less than 40 G of Heroin Level 18  
(or the equivalent amount of other Schedule I or II Opiates);  
At least 100 G but less than 200 G of Cocaine  
(or the equivalent amount of other Schedule I or II  
Stimulants);  
At least 1 G but less than 2 G of Cocaine Base;  
At least 20 G but less than 40 G of PCP, or at least 2 G but  
less than 4 G of PCP (actual);  
At least 10 G but less than 20 G of Methamphetamine, or  
At least 1 G but less than 2 G of Methamphetamine (actual), or  
at least 1 G but less than 2 G of Ice;  
At least 10 G but less than 20 G of Amphetamine, or  
At least 1 G but less than 2 G of Amphetamine (actual);  
At least 200 MG but less than 400 MG of LSD  
(or the equivalent amount of other Schedule I or II  
Hallucinogens);  
At least 8 G but less than 16 G of Fentanyl;  
At least 2 G but less than 4 G of a Fentanyl Analogue;  
At least 20 KG but less than 40 KG of Marihuana;  
At least 5 KG but less than 8 KG of Hashish;  
At least 500 G but less than 800 G of Hashish Oil;  
At least 20,000 but less than 40,000 units of Schedule I or II  
Depressants or Schedule III substances  
At least 1,250 but less than 2,500 units of Flunitrazepam.
- (12) At least 10 G but less than 20 G of Heroin Level 16  
(or the equivalent amount of other Schedule I or II Opiates);  
At least 50 G but less than 100 G of Cocaine  
(or the equivalent amount of other Schedule I or II  
Stimulants);  
At least 500 ML but less than 1 G of Cocaine Base;  
At least 10 G but less than 20 G of PCP, or at least 1 G but  
less than 2 G of PCP (actual);  
At least 5 G but less than 10 G of Methamphetamine, or  
At least 500 MG but less than 1 G of Methamphetamine (actual), or  
at least 500 MG but less than 1 G of Ice;  
At least 5 G but less than 10 G of Amphetamine, or  
At least 500 MG but less than 1 G of Amphetamine (actual);  
At least 100 MG but less than 200 MG of LSD  
(or the equivalent amount of other Schedule I or II  
Hallucinogens);  
At least 4 G but less than 8 G of Fentanyl;  
At least 1 G but less than 2 G of a Fentanyl Analogue;  
At least 10 KG but less than 20 KG of Marihuana;  
At least 2 KG but less than 5 KG of Hashish;  
At least 200 G but less than 500 G of Hashish Oil;  
At least 10,000 but less than 20,000 units of Schedule I or II  
Depressants or Schedule III substances  
At least 625 but less than 1,250 units of Flunitrazepam.
- (13) At least 5 G but less than 10 G of Heroin Level 14  
(or the equivalent amount of other Schedule I or II Opiates);  
At least 25 G but less than 50 G of Cocaine  
(or the equivalent amount of other Schedule I or II  
Stimulants);  
At least 250 ML but less than 500 ML of Cocaine Base;  
At least 5 G but less than 10 G of PCP, or at least 500 MG but  
less than 1 G of PCP (actual);  
At least 2.5 G but less than 5 G of Methamphetamine, or  
At least 250 MG but less than 500 MG of Methamphetamine (actual),

- or at least 250 but less than 500 MG of Ice;  
At least 2.5 G but less than 5 G of Amphetamine, or  
At least 250 MG but less than 500 MG of Amphetamine (actual);  
At least 50 MG but less than 100 MG of LSD  
(or the equivalent amount of other Schedule I or II  
Hallucinogens);  
At least 2 G but less than 4 G of Fentanyl;  
At least 500 MG but less than 1 G of a Fentanyl Analogue;  
At least 5 KG but less than 10 KG of Marihuana;  
At least 1 KG but less than 2 KG of Hashish;  
At least 100 G but less than 200 G of Hashish Oil;  
At least 5,000 but less than 10,000 units of Schedule I or II  
Depressants or Schedule III substances;  
At least 312 but less than 625 units of Flunitrazepam.
- (14) Less than 5 G heroin (or the equivalent amount of other  
"Schedule I or II Opiates);  
Less than 25 G Cocaine (or the equivalent amount of other  
Schedule I or II Stimulants);  
Less than 250 ML of Cocaine Base;  
Less than 5 G of PCP, or less than 500 MG of PCP (actual);  
Less than 2.5 G of Methamphetamine, or less than 500 MG of  
Methamphetamine (actual), or less than 500 MG of Ice;  
Less than 2.5 G of Amphetamine or less than 500 MG of  
Amphetamine (actual);  
Less than 50 MG of LSD (or the equivalent amount of other  
Schedule I or II Hallucinogens);  
Less than 2 G of Fentanyl;  
Less than 500 MG of a Fentanyl Analogue;  
At least 2.5 KG but less than 5 KG of Marihuana;  
At least 500 G but less than 1 KG of Hashish;  
At least 50 G but less than 100 G of Hashish Oil;  
At least 2,500 but less than 5,000 units of Schedule I or II  
Depressants or Schedule III substances;  
At least 156 but less than 312 units of Flunitrazepam  
40,000 or more units of Schedule IV substances.
- (15) At least 1 KG but less than 2.5 KG of Marihuana;  
At least 200 G but less than 500 G of Hashish;  
At least 20 G but less than 50 G of Hashish Oil;  
At least 1,000 but less than 2,500 units of Schedule I or II  
Depressants or Schedule III substances;  
At least 62 but less than 156 units of Flunitrazepam;  
At least 16,000 but less than 40,000 or more units of Schedule  
IV substances (except Flunitrazepam).
- (16) At least 250 G but less than 1 KG of Marihuana;  
At least 50 G but less than 200 G of Hashish;  
At least 5 G but less than 20 G of Hashish Oil;  
At least 250 but less than 1,000 units of Schedule I or II  
Depressants) or Schedule III substances;  
Less than 62 units of Flunitrazepam;  
At least 4,000 but less than 16,000 units of Schedule IV  
substances (except Flunitrazepam);  
At least 40,000 or more units of Schedule V substances.
- (17) Less than 250 G of Marihuana;  
Less than 50 G of Hashish;  
Less than 5 G of Hashish Oil;  
Less than 250 units of Schedule I or II Depressants or  
Schedule III substances;  
Less than 4,000 units of Schedule IV substances (except Flunitrazepam);  
Less than 40,000 units of Schedule V substances.

**\* Notes to Drug Quantity Table:**

“(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

“(B) The terms ‘PCP (actual)’, ‘Amphetamine (actual)’, and ‘Methamphetamine (actual)’ refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

“(C) ‘Ice,’ for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

“(D) ‘Cocaine base,’ for the purposes of this guideline, means ‘crack.’ ‘Crack’ is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

“(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

“(F) In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids), Schedule IV substances, and Schedule V substances, one “unit” means one pill, capsule, or tablet. If the substance is in liquid form, one “unit” means 0.5 gms.

“(G) In the case of anabolic steroids, one “unit” means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).

“(H) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

“(I) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

“(J) Hashish oil, for purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.”

**Drug Equivalency Tables**

**Schedule I or II Opiates<sup>49</sup>**

- 1 gm of Heroin = 1 kg of marihuana
- 1 gm of Alpha-Methylfentanyl = 10 kg of marihuana
- 1 gm of Dextromoramide = 670 gm of marihuana
- 1 gm of Dipipanone = 250 gm of marihuana
- 1 gm of 3-Methylfentanyl = 10 kg of marihuana
- 1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP = 700 gm of marihuana
- 1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP = 700 gm of marihuana
- 1 gm of Alphaprodine = 100 gm of marihuana
- 1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) = 2.5 kg of marihuana
- 1 gm of Hydromorphone/Dihydromorphinone = 2.5 kg of marihuana

<sup>49</sup> *Provided*, That the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

1 gm of Levorphanol = 2.5 kg of marihuana  
1 gm of Meperidine/Pethidine = 50 gm of marihuana  
1 gm of Methadone = 500 gm of marihuana  
1 gm of 6-Monoacetylmorphine = 1 kg of marihuana  
1 gm of Morphine = 500 gm of marihuana  
1 gm of Oxycodone = 500 gm of marihuana  
1 gm of Oxymorphone = 5 kg of marihuana  
1 gm of Racemorphan = 800 gm of marihuana  
1 gm of Codeine = 80 gm of marihuana  
1 gm of Dextropropoxyphene/Propoxyphene-Bulk = 50 gm of marihuana  
1 gm of Ethylmorphine = 165 gm of marihuana  
1 gm of Hydrocodone/Dihydrocodeinone = 500 gm of marihuana  
1 gm of Mixed Alkaloids of Opium/Papaveretum = 250 gm of marihuana  
1 gm of Opium = 50 gm of marihuana  
1 gm of Levo-alpha-acetylmethadol (LAAM) = 3 kg of marihuana

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)<sup>50</sup>

1 gm of Cocaine = 200 gm of marihuana  
1 gm of N-Ethylamphetamine = 80 gm of marihuana  
1 gm of Fenethylamine = 40 gm of marihuana  
1 gm of Amphetamine = 2 kg of marihuana  
1 gm of Amphetamine (Acetal) = 20 kg of marihuana  
1 gm of Methamphetamine = 2 kg of marihuana  
1 gm of Methamphetamine (Actual) = 20 kg of marihuana  
1 gm of Ice = 20 kg of marihuana  
1 gm of Khat = .01 gm of marihuana  
1 gm of 4-Methylaminorex (Euphoria) = 100 gm of marihuana  
1 gm of Methylphenidate (Ritalin) = 100 gm of marihuana  
1 gm of Phenmetrazine = 80 gm of marihuana  
1 gm Phenylacetone/P sub2 P (when possessed for the purpose of manufacturing methamphetamine) = 416 gm of marihuana  
1 gm Phenylacetone/P sub2 P (in any other case) = 75 gm of marihuana  
1 gm of N-N-Dimethylamphetamine = 40 gm of marihuana  
1 gm of Cocaine Base ("Crack") = 20 kg of marihuana  
1 gm of Aminorex = 100 gm of marihuana  
1 gm of Methcathinone = 380 gm of marihuana

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)<sup>51</sup>

1 gm of Bufotenine = 70 gm of marihuana  
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD = 100 kg of marihuana  
1 gm of Diethyltryptamine/DET = 80 gm of marihuana  
1 gm of Dimethyltryptamine/DMT = 100 gm of marihuana  
1 gm of Mescaline = 10 gm of marihuana  
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) = 1 gm of marihuana  
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) = 0.1 gm of marihuana  
1 gm of Peyote (Dry) = 0.5 gm of marihuana  
1 gm of Peyote (Wet) = 0.05 gm of marihuana  
1 gm of Phencyclidine/PCP = 1 kg of marihuana  
1 gm of Phencyclidine (actual)/PCP (actual) = 10 kg of marihuana  
1 gm of Psilocin = 500 gm of marihuana  
1 gm of Psilocybin = 500 gm of marihuana  
1 gm of Pyrrolidine Analog of Phencyclidine/PHP = 1 kg of marihuana  
1 gm of Thiophene Analog of Phencyclidine/TCP = 1 kg of marihuana  
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB = 2.5 kg of marihuana  
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM = 1.67 kg of marihuana

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<sup>50</sup> Provided, That the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

<sup>51</sup> Provided, That the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

1 gm of 3,4-Methylenedioxyamphetamine/MDA = 500 gm of marihuana  
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA = 500 gm of  
marihuana  
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA = 500 gm of  
marihuana  
1 gm of Paramethoxymethamphetamine/PMA = 500 gm of  
marihuana  
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC = 680 gm of marihuana  
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) = 1 kg of marihuana

Schedule I Marihuana

1 gm of Marihuana/Cannabis, granulated, powdered, etc. = 1 gm of marihuana  
1 gm of Hashish Oil = 50 gm of marihuana  
1 gm of Cannabis Resin or Hashish = 5 gm of marihuana  
1 gm of Tetrahydrocannabinol, Organic = 167 gm of marihuana  
1 gm of Tetrahydrocannabinol, Synthetic = 167 gm of marihuana

Flunitrazepam<sup>52</sup>

1 unit of Flunitrazepam = 16 gm of marihuana

Schedule I or II Depressants<sup>53</sup>

1 unit of a Schedule I or II Depressant = 1 gm of marihuana

Schedule III Substances<sup>54</sup>

1 unit of a Schedule III Substance = 1 gm of marihuana

Schedule IV Substances<sup>55</sup>

1 unit of a Schedule IV Substance = 0.0625 gm of marihuana

Schedule V Substances<sup>56</sup>

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

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<sup>52</sup> Provided, That the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.

The minimum offense level from the Drug Quantity Table for flunitrazepam individually or in combination with Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

<sup>53</sup> Provided, That the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

<sup>54</sup> Provided, that the combined equivalent weight of all Schedule III substances, Schedule I or II depressants, Schedule IV substances, and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

<sup>55</sup> Provided, that the combined equivalent weight of all Schedule IV and V substances shall not exceed 4.99 kilograms of marihuana.

<sup>56</sup> Provided, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

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